EXHIBIT 9
DATE 2-9-07
HB 138, 373

PURPOSE OF WATER USE ACT – PROTECTION OF SENIORS

Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (1984).

In discussing water law as it existed prior to the Water Use Act, the Montana Supreme Court stated:

> The State had no means to regulate proposed water uses to accommodate available water flows and **protect existing senior water rights** nor to insure that the public interest was being promoted. The Water Use Act, Section 85-2-101 et seq., MCA, was enacted in 1973. **As the culmination of consistent urgings for reform, it "substituted a new procedure for the appropriation of water rights**, ..." *General Agriculture Corp. v. Moore* (1975), 166 Mont. 510, 512, 534 P.2d 859.

211 Mont. at 97, 685 P.2d at 339-340.

"This unambiguous language of the legislature promotes the understanding that the Water Use Act was **designed to protect senior water rights holders from encroachment by junior appropriators** ~~adversely affecting those senior rights.~~"
211 Mont. at 98, 685 P.2d at 340.

BURDEN OF PROOF – CHANGED IN 1973 TO BE ON APPLICANTS

Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991):

> We disagree. *Prior to* adoption of the Water Use Act of 1973 and amendment of § 85-2-402, MCA, in 1985, ***parties objecting** to the change had the burden of demonstrating adverse impact to their water rights*. See Hutchins, *The Montana Law of Water Rights*, pp. 75-76 (1958); *Holmstrom Land Co. v. Newlan Creek Water District* (1979), 185 Mont. 409, 435, 605 P.2d 1060, 1075; *Hansen v. Larsen* (1911), 44 Mont. 350, 353, 120 P. 229, 231; *Lokowich v. City of Helena* (1913), 46 Mont. 575, 577, 129 P. 1063, 1063. **However, the statutory scheme set forth in the Water Use Act has re-assigned this burden**. The placement of the burden on the applicant also conforms to general rules regarding burdens of proof. "The initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side. Thereafter, the burden of producing evidence is on the party who would suffer a finding against him in the absence of further evidence." Section 26-1-401, MCA. **Under the statute here, the applicant would be defeated if neither side produced evidence**. Also, except as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting. Section 26-1-402, MCA. The applicant for a change of appropriation right has the burden as to the nonexistence of adverse impact. **The plain language of the statute now clearly places the burden on the applicant.**

October 14, 2006

Mick Seeburg
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Dear Mr. Seeburg,

You asked that I comment about two issues related to augmentation. First, you asked whether there was good scientific support for ground-water-surface-water interaction. The answer to this question is an unqualified yes. This topic is succinctly covered by C.W. Fetter in his textbook Hydrogeology (2001) on page 459 to 465. A quote from page 464 is instructive. "It is obvious that in stream-aquifer systems, it is counter productive to consider surface water management and ground-water management as separate actions." Recently there have been many papers on this subject. I have listed three of these papers as references below. Two are United States Geological Survey Circulars which are easily available in the public domain.

Stonestrom, D. A., and Constanz, J. 2003, Heat as a tool for studying the movement of ground water near streams: U.S. Geological Survey Circular 1260, 96 p.

Winter, T.C., Harvey, J.W., Franke, O.L., and Alley, W.M., 1998, Ground water and surface water a single resource: United States Geological Survey Circular 1139, 79 p.

Woessner, W. W., 2000, Stream and fluvial plain ground water interactions: rescaling hydrogeologic thought: Ground Water, v. 38, no. 3, p. 423-429.

Your second question was about whether there was scientific evidence for augmentation. Again, Fetter's text book (Fourth edition, 2001, page 464-465)is instructive. This concept is by no means new. Fetter comments on New Mexico law and Colorado also uses this approach, and many of his references come from the 1970's and 1980's. Indeed, in Montana, the connection between irrigation, surface water, and ground water was essential to understanding the sediment production in Muddy Creek in Montana and reminds us of the intimate connection between irrigation and ground water and streams. There is little question that augmentation occurs in response to irrigation.

Fetter, C. W., 2001, Applied Hydrogeology: Prentice Hall, Upper Saddle River, New Jersey, 598 p. (See page 459-465 in particular).

Browning, L.S., Bauder, J.W., Hershberger, K.E., and Sessoms, H.N., 2005, Irrigation return flow sourcing of sediment and flow augmentation in receiving streams: a case study: Journal of Soil and Water Conservation, v. 60, no. 3, p. 134-141.

Fetter reminds us that "While the benefits of conjunctive ground-water and surface-water use are obvious, the implementation of management is not easy" (p. 465). There is little question that ground-water models will be needed in any augmentation plan. Such models can be uncertain. This does not mean they should not be used, nor does this mean that one can accept the outcome of the models without question. As with any modeling effort, the model should be validated and modified in light of the new data that comes to light during the validation exercise. When an augmentation program is proposed, the model should not be shelved. Rather, a monitoring program should be implemented and the model tested and revised in light of new data. Without such a monitoring and validation program, the augmentation plan may fail, but with one, there is a reasonable chance that a positive outcome can be achieved.

I hope this letter helps to clarify some of your questions.

Sincerely,

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